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(214)

In Great Britain and Ireland
Commissioners and trustees for
(1) forfeited estates.

112

The honourable the Commissioners of the Forfeited Estates. } Appellants.

***George Lochart* of *Carnwath*, Esq;** } Respondent.

The Respondent's CASE.

THAT *Robert* Earl of *Southesque* deceased the 28th day of *April* 1674, gave a Bond of Pension to Sir *George Lochart* (the Respondent's Father) who was an Advocate of great Eminence in *Scotland*, for the paying of 300 Merks *Scots* yearly to the Respondent's said Father, his Executors, Administrators and Assigns, during his Continuance to be an Advocate, by two half yearly Payments, the first to be at *Martimas*, 1674.

l. s. d.
16 13 4 *Ster.*

That the Respondent's said Father continued an Advocate till the first of *January* 1686, at which time he was made Lord President of the Session in *Scotland*.

That the Respondent's said Father died in *March* 1689, leaving the Respondent his eldest Son and Heir, about eight Years of Age.

That *James* late Earl of *Southesque*, Heir of the said Earl *Robert*, being attainted by Act of Parliament, all his Estate was by several Acts of Parliament vested in the Appellants, for the Use of the Publick, subject to the Claims of lawful Creditors.

That the said Bond not being satisfied or paid, the Respondent, who as Administrator to his Father was intitled thereto, duly entred his Claim before the Appellants for the said Sum of 300 Merks, from *Martimas* 1674, to *January* 1686.

That this Claim coming to be heard before the Appellants upon the first of *September* 1719, they were pleased to disallow the said Claim, and dismis it.

That the Respondent thereupon appealed to the Court of Delegates, and their Lordships, after hearing Council for the Appellants and Respondent, were pleased on the 3d of *March* 172¾, to reverse the said Decree of the Appellants with this Quality, 'That the Re-'spondent do make up proper Titles in his Person to the said Debt 'before he receive Debentures from the Appellants, and also give 'his Oath of Credulity or Knowledge as to any Payment made of 'the Debt acclaimed, and restrict the laid Claim to the time Respon-'dent's Father was made President of the Session."

3d of *March* last.

Against this Decree of the Court of Delegates, the Appellants have brought their Petition and Appeal, and pray the same may be reversed for these Reasons.

Objection I. That the Bond claimed has never been put in Suit, nor any Proof made of any Demand, or any Diligence done upon the same by

by the Obligee or the Reſpondent, and therefore is preſumed to have been paid and ſatisfied.

Anſwer. That as the Bond in Queſtion is admitted to be regularly executed, it is not to be taken away by Preſumptions of any kind. If a Bond is not ſued for in 40 Years after its Date, it is then barred by the Statute of Limitations, but if any Suit is commenced in that time, nothing can take away the Effect of that Bond but an actual proof of Payment; for as the Obligee is not obliged to ſue, having the Original Bond in his Poſſeſſion, is a Preſumption of non-Payment; and if a Suit is commenced within 40 Years, the Obligee will be entitled to recover Payment.

It is true, the Bond in Queſtion was executed in 1674, and the laſt yearly Sum payable upon it became due in 1686, but the Reſpondent was 12 Years of the time an Infant; and it is expreſly by
9 *Stat.* Statute provided, *That in the Courſe of the ſaid* 40 *Years Preſcription, the Years of Minority and Leſſage ſhall no ways be counted, but only the Years during the which the Parties againſt whom the Preſcription is uſed and objected were Majors, and paſt* 21 *Years of Age*, and the Reſpondent's Claim being entred in
1718. the Year 1718, there was not full 19 Years after the laſt Payment became due on the Bond before ſuch Claim was entered, incluſive of the Years the Reſpondent was under Age, nor above 32 Years from the Date excluſive of the time of the Reſpondent's Minority.

Objection II. There is no Proof made of any Service by the Reſpoedent's Father as an Advocate to the ſaid Earl of *Southeſque* deceaſed, and that being the reaſon for giving the Bond, the ſame ought to be proved.

Anſwer. There is no Neceſſity of any ſuch Proof, ſince Bonds of this kind are given only as retaining Fees, and are payable whether there be any Service or not; eſpecially,

Since the very Recital of the Bond is for *certain good Deeds done and performed and to be done and performed, and is* payable to the Obligee, his Heirs, Executors and Aſſigns *during his continuing to be an Advocate*, which plainly ſhews any Proof of a Service was not neceſſary, and indeed in the Nature of this Caſe is impracticable to be had.

Objection III. That ſuch Penſions are uſually paid annually, and ſo it's preſumed to have been done in this Caſe, eſpecially ſince at this Diſtance of Time it is impracticable to recover what Diſcharges might have been given for the ſame.

Anſwer I. Such Penſions are ſeldom or never paid annually, on the contrary they are frequently and uſually left unpaid for a great many Years together: And in the Caſe of Mrs. *Black* and Sir *Peter Frazer*, upon an Appeal, it was determined the Penſion ſhould be paid tho' a great many Years in Arrear.

II. It's of no Moment that Diſcharges cannot now be eaſily recovered, for that will be an Argument againſt all Debts that are ſued at any Diſtance of Time; and on the contrary, it is preſumed that the Obligee having the Bond, the Debt is not ſatisfied unleſs Diſcharges are produced.

Objection IV. That the Reſpondent refuſed to give Oath that he knew the Debt was owing.

The

Answer. The Respondent was willing and offered to make Oath that no Part of the Debt due by the said Bond was paid to himself, and that he believed that the whole was still remaining unpaid; and the Decree of the Court of Delegates appealed against, does expresly direct that the Respondent should give his Oath as to any Payment to his Knowledge and Belief, which is all any Man can with Regard to Truth possibly make Oath of.

Since then the Bond is in possession of the Respondent, and the same is not barred by the Statute of Limitations, and the Respondent is willing to make Oath that to his Knowledge or Belief no Part of the Money thereby due was paid, he humbly hopes the said Decree of the Court of Delegates appealed against shall be affirmed, and the Appeal dismissed with Costs.

George Earl of *Marishal*, deceased the 10th Day of *March* 1673, executed a Bond to the said Sir *George Lochart*, reciting, That he having many Experiences of the sound and wholesome Advices and good Services done to him by his trusty and faithful Friend Sir *George Lochart*, Advocate, his ordinary Advocate and Counsellor in his Affairs and Business at Law, and being very sensible of the Trouble and Pains he is put to therein, and being desirous in some Measure to remunerate his Kindness, and trusting he will continue the same towards him, therefore he obliges himself to pay to the said Sir *George Lochart*, his Heirs, Executors or Assigns, 400 Merks *Scots* Money, in Name of Pension, yearly, in Time coming, during the said Sir *George*'s continuing to be an Advocate.

N. B.

22 *Lib. Ster.*

Alexander Earl of *Callender*, deceased the 11th of *February*, 1676, upon a like Recital, executed a Bond for paying to the said Sir *George Lochart* during all the Days of his Life-time, at least during his continuing to be employed in his Affairs, and until the said Pension should be recalled and discharged, the Sum of 400 Merks yearly. That the Respondent in like Manner claimed the several Sums due upon the said two Bonds; which Claims were dismiss'd by the Appellants: But upon an Appeal to the Court of Delegates, their Decrees were reversed and the same Decree made in these Cases as in the Case of the Earl of *Southesque*.

22 *Lib. Ster.*

3d of *March* last.

Both which Decrees are appealed against, and are by Order to be heard at the same Time with the other Decree for the Claim upon the Estate of *Southesque*, and the Respondent humbly hopes all the said Decrees shall be affirmed, and the Appeals dismissed with Costs.

C. Talbot.
W. Hamilton.

The honourable the Commissioners of the Forfeited Estates } Appt.

George Lochart of *Carnwath* Esq; } Respt.

The Respondent's CASE.

To be heard the fifth of *February*, 172$\frac{4}{5}$.